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GHOZI ABU BAKAR

v.

MAJLIS ANGKATAN TENTERA & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI JC
[CIVIL SUIT NO: S7-21-121-2005]
3 AUGUST 2006

C ***CIVIL PROCEDURE:*** *Action - Commencement - Exercise of power by public authority - Action against - Whether by way of writ and statement of claim - Whether by way of judicial review - Rules of the High Court 1980, O. 18 r. 19, O. 53 r. 2(2)*

D The plaintiff is an officer of the Royal Malaysian Navy holding the rank of Lieutenant Commander. On 1 May 2002, the Yang di Pertuan Agong ('YDPA'), upon the recommendation of the first defendant, cancelled the plaintiff's commission and further retired him from service. No reason was accorded for the decommissioning. Aggrieved, the plaintiff commenced a writ action E against the defendants challenging the first defendant's exercise of power as unlawful and in violation of the rules of natural justice. The defendants argued that the plaintiff ought to have proceeded by way of judicial review, and in the circumstances applied to strike out the writ and statement of claim under O. 18 r. 19(1)(d) F Rules of the High Court 1980 ('RHC'). It was the defendants' stand that the plaintiff was seeking to challenge the decision of a public authority, and hence the judicial review process under O. 53 of the RHC. The striking out application was however dismissed by the learned deputy registrar, whereupon the G defendants appealed. Before the learned judicial commissioner, the sole issue that arose was whether the plaintiff's claim herein had abused the court process and so ought to be struck out.

Held (allowing the appeal):

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(1) The plaintiff's grievance was that he was denied natural justice and a right to be heard. Since the plaintiff is seeking a remedy on an allegation that a public authority that is entitled to protection under the law has exceeded or infringed the law, I the plaintiff must proceed by way of judicial review under O. 53 RHC and not otherwise. Clearly, by filing the writ and

statement of claim, the plaintiff was trying to circumvent the leave requirement under O. 53 RHC. There was thus an abuse of the process of the court. (paras 12, 13, & 14)

(2) The plaintiff's allegation of there being no "decision making process", if true, is a more serious flaw than a process with flaws and surely a judicial review would be the correct remedy. Likewise, the plaintiff's argument that he was only praying for declarations, and not for *certiorari*, is of no assistance as O. 53 r. 2(2) provides for a prayer for declaratory orders for matters initiated thereunder. (paras 18 & 19)

[Appeal allowed; decision of deputy registrar set aside; writ and statement of claim struck off.]

Case(s) referred to:

Arab Malaysia Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA

Mohamad Din Talip v. Polis DiRaja Malaysia [2004] 4 CLJ 804 CA

Robert Cheah Foong Chew v. Lembaga Jurutera Malaysia [2005] 4 AMR 80

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(d), O. 53 r. 2(2)

Specific Relief Act 1950, s. 41 Chapter VI

For the plaintiff - Mohd Fairuz; M/s Zalil Mohd & Partners
For the defendants - Osman Affendi; SFC

Reported by WA Sharif

JUDGMENT

Noor Azian Shaari JC:

[1] This is an appeal against the decision of the learned deputy registrar made on 16 December 2005 dismissing the defendants' application to strike out the writ and statement of claim under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 (RHC).

[2] The plaintiff, Ghozi bin Abu Bakar a former commissioned officer of the Royal Malaysia Navy ("TLDM") holding the rank of Leftenan Commander by a writ and statement of claim filed on 26 April 2005 is suing the defendants, The Armed Forces Council and the Government of Malaysia for the following reliefs:

A (a) Satu perisytiharan bahawa pembatalan tauliah Plaintif oleh YDPA yang berkuatkuasa mulai 1.5.2002 adalah tidak sah;

(b) Satu perisytiharan bahawa keputusan YDPA yang membersarakan Plaintif daripada perkhidmatan ATM yang berkuatkuasa mulai 1.5.2002 adalah tidak sah;

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(c) Satu perisytiharan bahawa Plaintif berhak kepada segala gaji, elaun dan faedah sebagai pegawai bertauliah TLDM berpangkat Leftenan Komander TLDM mulai 1.5.2002 sehingga 17.2.2011 seperti berikut;

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(i)	Gaji RM3,536.83 x 105.61	RM373,524.62
(ii)	Elaun Khidmat Tentera	
	RM165.00 x 105.61 bulan	RM 20,593.95
(iii)	Elaun Rumah	
	RM500.00 x 105.61 bulan	RM 52,805.00
	Jumlah	**RM446,923.57**

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E (d) Gantirugi teladan atau gantirugi yang ditaksirkan oleh Mahkamah Yang Mulia ini;

(e) Gantirugi khas berjumlah RM446,923.57 seperti yang dinyatakan di perenggan (c);

F (f) Faedah 8% setahun ke atas jumlah gantirugi teladan atau gantirugi am dari tarikh penghakiman hingga penyelesaian penuh;

(g) Faedah 8% setahun ke atas jumlah gantirugi khas mulai 1.5.2002 hingga penyelesaian penuh;

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(h) Kos; dan

(i) Lain-lain relif yang difikirkan adil dan suai manfaat oleh Mahkamah Yang Mulia ini.

H **[3]** The chronology of events of the case is as follows:

(1) 26 April 2005 – The plaintiff filed the writ and statement of claim – encl. 1

(2) 20 July 2005 – The defendant filed their appearances – I encl. 4

(3) 5 August 2005 – The defendant filed the summons in chambers to strike out the plaintiff's claim under O. 18 r. 19(1)(d) of the RHC – encl. 6

(4) 6 December 2005 – Hearing of encl. 6

(5) 15 December 2005 – Decision of TP dismissing the defendants' application in encl. 6

(6) 21 December 2005 – Defendants filed notice of appeal against TP's decision of 15 December 2005 – encl. 11

(7) 22 December 2005 – The plaintiff filed a summons in chambers to enter judgment in default against the plaintiff – encl. 9

[4] The defendants' application to strike out the writ and statement of claim is premised on O. 18 r. 19(1)(d) of the RHC stating that it is an abuse of the process of the court by reason of:

(a) melalui P.U.(A) 342/2000, iaitu suatu pindaan yang dibuat kepada Kaedah-Kaedah Mahkamah Tinggi 1980 berkuatkuasa mulai 22.9.2000, salah satu implikasinya ialah apa-apa permohonan yang dibuat untuk mencabar satu keputusan pihak berkuasa awam hanya boleh dibuat melalui permohonan untuk Semakan Kehakiman di bawah Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980;

(b) keputusan yang dicabar oleh Plaintif dalam tindakan ini ialah keputusan YDPA yang membatalkan tauliah dan membesarakan Plaintif daripada perkhidmatan ATM atas syor Defendan Pertama berkuatkuasa mulai 1.5.2002 sepertimana yang diplidkan dalam perenggan-perenggan 7, 9, 12, 15, 16a dan 16b. Pernyataan Tuntutan; dan

(c) Tindakan Plaintif ini merupakan suatu percubaan untuk memintas kehendak Aturan 53 Kaedah-Kaedah Mahkamah Tinggi 1980.

[5] The plaintiff submitted that:

(1) Plaintiff is seeking for a declaration and does not want to be reinstated but pray for damages. *Certiorari* if allowed will quash the decision of YDPA and the Plaintiff will be reinstated;

(2) A declaration can be sought by virtue of s. 41, Chapter VI of the Specific Relief Act 1950;

(3) The plaintiff is seeking a remedy that can be granted in accordance with O. 15 r. 16 RHC;

(4) The plaintiff's application is not based on any "decision making process" or any process of trial by the Armed Forces Council as the plaintiff's commission was cancelled and he was retired without being informed of the reasons or grounds.

[6] In considering the plaintiff's application the following must be noted:

(1) The decision to cancel the plaintiff's commission and the retirement by the YDPA was with effect from 1 May 2002;

(2) The plaintiff is seeking a declaration that the decision to cancel the plaintiff's commission and to retire him is null and void and therefore the plaintiff entitled to damages; and

(3) The events took place after O. 53 of the RHC was amended by P.U.(A) 342/2000.

[7] Under the circumstances the amended O. 53 of the RHC will apply. I do not think it is necessary for me to explain the position before the amendment of O. 53 of the RHC. Many reported cases have done so and I think they've clarified the position. As far as this case is concerned the prevailing O. 53 of the RHC applies.

[8] After hearing the submissions of both counsels for the plaintiff and the defendant, I allowed the defendants' appeal and set aside the decision of the learned deputy registrar of 16 December 2005. The plaintiff's writ and statement of claim is therefore struck out under O. 18 r. 19(1)(d) of the RHC with cost.

[9] In essence, the issue before this court is whether it is an abuse of the court process for the plaintiff to initiate the plaintiff's claim against the defendants by way of writ and statement of claim instead of by judicial review under the provisions of O. 53 of the RHC. It is therefore pertinent to have sight of the relevant order which is as follows:

1 Scope (O. 53 r. 1)

(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.

(2) This Order is subject to the provision of Chapter VIII of Part 2 of the Specific Relief Act 1950.

2 Applications (O. 53 r. 2)

(1) An application for any of the relief's specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 111A.

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

(4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

3 Leave (O. 53 r. 3)

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[10] There is no doubt that the YDPA on the recommendation of the 1st defendant is empowered to cancel the plaintiff's commission without assigning any reason and retire him under the provisions of the Armed Forced Council Act 1974. It is this exercise of power that the plaintiff is now challenging.

[11] The plaintiff in challenging the said exercise of power filed the writ and statement of claim to declare the act as unlawful the reasons being that:

(1) the plaintiff was never given any notice of the defendant's intention to retire the plaintiff;

(2) the plaintiff was not informed by the defendant of the reasons or grounds for the cancellation of the commission and the retirement; and

(3) the plaintiff was not given the right to be heard, a fundamental right in natural justice.

[12] Basically his grievance is that he was denied natural justice and a right to be heard and hence the cancellation of his commission and retirement was *ultra vires* or excess of jurisdiction. Hence, it is clear that the plaintiff is seeking to set aside a decision of a public authority that he alleges is *ultra vires* contrary to the principle of natural justice and the right to be heard.

[13] Since the plaintiff is seeking a remedy on an allegation that a public authority that is entitled to protection under the law has exceeded or infringed the law, the plaintiff must proceed by way of a judicial review and not by way of an ordinary action ie, in the case the plaintiff has chosen by way of writ and statement of claim for an injunction or otherwise.

[14] By filing the writ and statement of claim and not by way of O. 53 RHC it appears that the plaintiff is trying to circumvent the leave requirement of O. 53 of the RHC. It was held in the case of *Robert Cheah Foong Chew v. Lembaga Jurutera Malaysia* [2005] 4 AMR 80 that:

> (1) It was clear from the OS, that the applicant was seeking a public law remedy. The declaratory and injunctive relief sought are in relation to public law rights to the possible public law decision that may be made by the respondent under s. 15(1) of the Registration of Engineers Act 1967. As a general rule, a party seeking to establish that a decision of a person or body infringes rights which are entitled to protection under public law, must proceed by way of judicial review and not by way of an ordinary action whether for declaratory or injunctive relief or otherwise. By proceeding by way of OS, the applicant was attempting to evade the leave requirement under Order 53 of the RHC, which on the facts of this case is unlikely to be granted to the applicant. In the circumstances, it is an abuse of process for the applicant to have resorted to the OS procedure for the relief sought, and thereby evading the clear requirements of Order 53 of the RHC.

[15] In the case of *Arab Malaysia Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003]1 CLJ 585 at p. 616 Gopal Sri Ram JCA also said:

> Accordingly, if there had been a failure on the part of the 4th defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review.

[16] Thus in this case, I'm of the opinion that there is a abuse of the process of the court.

[17] The plaintiff argued that it is not seeking for *certiorari* which is a judicial review as "judicial review is concerned, not with the decision but with the decision making process." because there was no decision making process as the plaintiff was simply informed of the cancellation of his commission and the retirement. In the case of *Mohamad Din Talip v. Polis DiRaja Malaysia* [2004] 4 CLJ 804 it was said:

> In *R Rama Chandran v. The Industrial Court of Malaysia, supra,* Edgar Joseph Jr FCJ said (at pp. 172-173):

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> It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg, *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
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> But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance.

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[18] If the plaintiff alleges there was no decision making process, I would venture to state that it would appear to be a more serious flaw than a process with flaws and surely a judicial review would be the correct remedy.

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[19] The plaintiff's argument that he is not praying for a *certiorari* as he does not want to be reinstated but instead asked for a declaration is also baseless. As can be seen, O. 53 r. 2(2) also provides for a prayer for declaratory orders for matters initiated under the said order.

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[20] For the reasons above, I allowed the defendant's appeal with cost setting aside the learned deputy registrar's decision of 16 December 2005. The writ and statement of claim is hereby struck off.

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